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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA, FRESNO DIVISION

In re:	Case No.: 17-13797-9-B
TULARE LOCAL HEALTHCARE DISTRICT dba TULARE REGIONAL MEDICAL CENTER,	Chapter 9
Debtor.	ADV. PROC. NO.: 17-01095-B
_____ HEALTHCARE CONGLOMERATE ASSOCIATES, LLC,	DC No.: OHS-2
Plaintiff,	HEALTHCARE CONGLOMERATE ASSOCIATES, LLC'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS COUNTERCLAIM AGAINST HCCA OR IN THE ALTERNATIVE TO STRIKE PORTIONS THEREOF
v.	Date: March 12, 2018
TULARE LOCAL HEALTHCARE DISTRICT dba TULARE REGIONAL MEDICAL CENTER, and DOES 1 through 20,	Time: 10:30 a.m.
Defendant.	Dept: Courtroom 13
AND RELATED COUNTER-CLAIM	Judge: Hon. René Lastreto II

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1 **I. INTRODUCTION**

2 Plaintiff HealthCare Conglomerate Associates, Inc. (“HCCA”) submits this memorandum
3 of points and authorities in support of its Motion to Dismiss the Counterclaim Against HCCA
4 (Dkt. No. 9) (“Counterclaim”) filed by Tulare Local Healthcare District dba Tulare Regional
5 Medical Center (“TRMC”). The Counterclaim, which amounts to a rant of bare accusations,
6 omitting only the kitchen sink, should be dismissed in its entirety on two alternate grounds. First,
7 because the Court lacks subject matter jurisdiction under Federal Rule of Civil Procedure
8 12(b)(1).¹ Second, because the suit is improperly venued pursuant to Federal Rule of Civil
9 Procedure 12(b)(3). As HCCA detailed in its Motion For Remand Of Lawsuit To State Court
10 Pursuant To 28 U.S.C. § 1452(b) (Dkt. No. 17) (the “Remand Motion”), filed on January 24,
11 2018, and in its supporting documents, TRMC’s improper removal of this litigation either leaves
12 the Court without subject matter jurisdiction or constitutes defective venue.²

13 If the Counterclaim is not dismissed in its entirety, many of its individual putative causes
14 of action still should be dismissed on one of two primary grounds. The third, fourth, fifth, sixth,
15 seventh, eighth, and eleventh causes of action, all fraud-based, should be dismissed because they
16 are not pleaded with the requisite particularity required by Federal Rule of Civil Procedure 9(b).³
17 Allegations of fraud must be stated with “particularity,” including the time, place, speaker, and
18 specific content of purportedly fraudulent representations, and cannot be supported by
19 “conclusory allegations.” Fed R. Civ. P. 9(b); *Moore v. Kayport Package Exp., Inc.*, 885 F.2d
20 531, 540-41 (9th Cir. 1989). The Counterclaim fails to provide these required details; instead,
21 TRMC repeatedly relies on pleading its allegations on “information and belief” as cover for its
22 lack of particularity (and then, in turn, fails to offer any factual allegations explaining the basis
23 for its information and belief). *Neubronner v. Milken*, 6 F.3d 666, 672 (9th Cir. 1993)
24 (allegations of fraud made on information and belief “must state the factual basis for the belief.”).

25 ¹ Federal Rule of Civil Procedure 12(b)-(i) is made applicable to adversary proceedings pursuant to Federal Rule of
26 Bankruptcy Procedure 7012(b).

27 ² HCCA reiterates its arguments as to subject matter jurisdiction and improper venue in sections II.A and II.B of this
28 Motion. Should the Remand Motion be granted, this motion to dismiss will be rendered moot, which is why HCCA
has set this Motion for hearing two weeks after the hearing on the Remand Motion.

³ Federal Rule of Civil Procedure 9 is applicable to adversary proceedings pursuant to Federal Rule of Bankruptcy
Procedure 7009.

1 The heightened particularity requirements of Rule 9(b) apply to all of the causes of action
2 that are *based on* TRMC's allegations of fraud, not just those labeled as actions for fraud. Where
3 a party "allege[s] a unified course of fraudulent conduct and rel[ies] entirely on that course of
4 conduct as the basis of a claim . . . the claim is said to be 'grounded in fraud' or to 'sound in
5 fraud,' and the pleading of that claim as a whole must satisfy the particularity requirement of Rule
6 9(b)." *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103–04 (9th Cir. 2003). Thus, all of the
7 causes of action in the Counterclaim that sound in fraud (the third, fourth, fifth, sixth, seventh,
8 eighth, and eleventh) and fail to plead the required level of particularity should be dismissed.

9 In addition, the third, fourth, and eighth causes of action also should be dismissed for
10 failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). The third and fourth
11 causes of action rest on the same alleged misrepresentations. However, upon inspection, it is
12 clear that even if the alleged statements were made, they could not have been "false", and thus do
13 not support a claim of fraud or negligent misrepresentation. The eighth cause of action is nothing
14 more than a recitation of statutory elements, which is plainly insufficient to support a claim.

15 Finally, to the extent any claims remain, HCCA moves pursuant to Federal Rule of Civil
16 Procedure 12(f) to strike certain portions of the Counterclaim that are improperly based on
17 information and belief.

18 **II. LEGAL ANALYSIS**

19 **A. The Counterclaim Should Be Dismissed For Lack Of Subject Matter** 20 **Jurisdiction Pursuant To Fed. R. Civ. P. 12(b)(1).**

21 TRMC's unauthorized removal of this action to this Court does not vest the Court with
22 subject matter jurisdiction. Thus, dismissal of the Counterclaim is required pursuant to Federal
23 Rule of Civil Procedure 12(b)(1).

24 That is the precedent established by multiple federal circuits faced with unauthorized
25 removals under 28 U.S.C. § 1452(a) to a district other than the geographic district in which the
26 state court action is pending.⁴ For instance, the Eleventh Circuit has held that removal to the

27
28 ⁴ The Ninth Circuit has not addressed whether removal to the wrong district in the context of the bankruptcy removal statute, now 28 U.S.C. § 1452, defeats subject matter jurisdiction or simply constitutes defective venue requiring

1 wrong district defeats subject matter jurisdiction. *In re Nat'l Developers, Inc.*, 803 F.2d 616, 620
2 (11th Cir. 1986) (holding that remand was required because the removal was defective and
3 therefore subject matter jurisdiction was lacking in the court to which the case was removed).⁵
4 The Third Circuit reached the same conclusion, holding the removal void *ab initio* for lack of
5 subject matter jurisdiction. *In re Bobroff*, 766 F.2d 797, 801-802 (3rd Cir. 1985) (quoting *Pacor,*
6 *Inc. v. Higgins*, 743 F.2d 984, 993 (3rd Cir. 1984)). Although the Ninth Circuit has not ruled on
7 this specific issue, it has made clear its strong support for the presumption against removal
8 jurisdiction and potentially unauthorized removals must be rejected “ . . . if there is any doubt as
9 to the right of removal in the first instance.” *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir.
10 1992). Accordingly, it is likely that the Ninth Circuit would view unauthorized removal as a
11 jurisdictional defect that does not create subject-matter jurisdiction.

12 TRMC's removal was not authorized by statute. Because the lawsuit was pending in the
13 Superior Court for Los Angeles County, the right to remove is limited to the Central District and
14 then only if that district court would have jurisdiction over the Complaint under 28 U.S.C. § 1334
15 (which it does not). There was thus no statutory authority for TRMC to remove this action to this
16 court. HCCA respectfully submits that this Court lacks subject matter jurisdiction over the
17 Counterclaim, and it should be dismissed under Rule 12(b)(1).

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22 remand. The issue was discussed in *In re Bisno*, 433 B.R. 753 (Bankr. C.D. Cal. 2010), which acknowledged the
lack of Ninth Circuit authority on the issue, and remanded the adversary proceeding due to improper venue.

23 ⁵ The *National Developers* court reached its decision even though 28 U.S.C. § 1478(b), the predecessor to § 1452(b),
24 provided that an order denying a motion for remand “is not reviewable by appeal or otherwise.” According to the
Eleventh Circuit, non-reviewability under § 1478(b) applied only to discretionary decisions whether or not to
25 remand. It went on to hold that remand was required because the court to which the action was removed lacked
subject matter jurisdiction given the unlawful removal. The Eleventh Circuit joined both the Fifth Circuit (*see*
26 *Browning v. Navarro*, 743 F.2d 1069, 1076 n. 21 (5th Cir. 1984)) and Third Circuit (*Pacor, Inc. v. Higgins*, 743 F.2d
984, 993 n. 14 (3rd Cir. 1984)), both of which had reached the same conclusion regarding reviewability of remand
27 denials. While a later Eleventh Circuit opinion, *Peterson v. BMI Refractories*, 124 F.3d 1386 (11th Cir. 1997), found
that removal to the wrong district under 28 U.S.C. § 1441, the removal statute for non-bankruptcy cases, was a
28 procedural defect that does not deprive the receiving court of subject matter jurisdiction, it noted that *National*
Developers “remains the law of this circuit with respect to the bankruptcy removal statute.” *Peterson*, 124 F.3d at
1393-1394 (citing the predecessor to § 1452(a)).

1 **B. The Counterclaim Should Be Dismissed For Improper Venue Pursuant To**
2 **Fed. R. Civ. P. 12(b)(3).**

3 As shown in the Remand Motion, removal to the wrong district court is typically treated
4 as resulting in a lack of subject matter jurisdiction, although in at least one case has been treated
5 as a matter of improper venue. *See In re Bisno*, 433 B.R. 753, 758 (Bankr. C.D. Cal. 2010).
6 Thus, the Counterclaim should be dismissed for improper venue pursuant to Federal Rule of Civil
7 Procedure 12(b)(3).

8 **C. Most Of The Causes Of Action In The Counterclaim Should Be Dismissed**
9 **For Failure To Plead Claims With Sufficient Particularity Pursuant To Fed.**
10 **R. Civ. P. 9(b) Or For Failure To State A Claim Pursuant To Fed. R. Civ. P.**
11 **12(b)(6) Or Both.**

12 Should the Court see fit not to dismiss the Counterclaim in its entirety, HCCA requests
13 that the Court dismiss the third, fourth, fifth, sixth, seventh, eighth, and eleventh causes of action
14 on the following grounds:

15 **1. The Third Cause Of Action (For Fraud) Should Be Dismissed Because**
16 **It Is Not Plead With The Required Particularity And Because It**
17 **Fails To Allege An Actual Misrepresentation.**

18 Federal Rule of Civil Procedure 9(b) “requires that the pleader state the time, place, and
19 specific content of the false representations as well as the identities of the parties to the
20 misrepresentation.” *Moore*, 885 F.2d at 540-41; *see also Shroyer v. New Cingular Wireless*
21 *Servs., Inc.*, 622 F.3d 1035, 1042 (9th Cir. 2010). “[M]ere conclusory allegations of fraud are
22 insufficient.” *Moore*, 885 F.2d at 540. This requirement serves to provide defendants with
23 adequate notice of a fraud cause of action, prevent the filing of fraud claims as a pretext for
24 discovery, protect the reputation of parties who are subject to accusations of fraud, and prohibit
25 claimants from unilaterally imposing significant costs on the court and other parties absent a
26 factual basis for their fraud allegations. *See Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th
27 Cir. 2009). Any averment of fraud that fails to meet the particularity requirement should
28 therefore be disregarded and stripped from the claim. *Vess*, 317 F.3d at 1105. Whatever
allegations remain, if any, are then analyzed to see if a claim has been sufficiently stated. *Id.*

1 TRMC's allegations of fraud are not pleaded with the required particularity. In
2 paragraphs 34-40 of the Counterclaim, TRMC accuses HCCA of a number of alleged
3 misrepresentations, but offers no specifics as to the time (other than "beginning in 2016"), place,
4 or individual who made the alleged statements. Instead, TRMC's cause of action rests on the
5 type of conclusory accusations that *Moore* held insufficient.

6 Moreover, these accusations are further muddled by the Counterclaim's systemic
7 overreliance on pleading on "information and belief". As made clear in paragraph 2 of the
8 Counterclaim, essentially all of the causes of action stated in the counterclaim, including those for
9 fraud, are pleaded on information and belief.⁶ Where allegations of fraud are made on
10 information and belief, such allegations "must state the factual basis for the belief." *Neubronner*,
11 6 F.3d at 672. "Claims made on information and belief are not usually sufficiently particular,
12 unless they accompany a statement of facts on which the belief is founded." *Shroyer*, 622 F.3d at
13 1042.

14 The Counterclaim offers no such factual basis. To the contrary, it uses "information and
15 belief" pleading as a crutch to *avoid* pleading any specifics in support of its fraud claims. *Cf. In*
16 *re Orosco*, 77 B.R. 246, 250–51 (Bankr. N.D. Cal. 1987) ("The major factual allegations of the
17 Claim . . . are made on 'information and belief,' which, in essence, means that [the pleading
18 party] has declined to aver without equivocation that its factual allegations are true."). The
19 minimal facts provided in paragraph 35 of the Counterclaim neither explain the foundation for
20 TRMC's "information and belief" assertions nor provide the required time, place, and identity
21 details for the alleged misrepresentations. TRMC has failed to meet its burden to plead fraud
22 with particularity and its third cause of action should therefore be dismissed.

23 In addition to lacking the requisite particularity, TRMC's fraud claim fails for a second
24 reason: it does not allege an actual misrepresentation. The Counterclaim's third cause of action

25 ⁶ The Counterclaim expressly refers to its reliance on "information and belief" 25 times. Dkt. No. 9 at ¶¶ 2, 5-7, 11-
26 12, 15, 17-19, 21, 35, 50, 58, 70, 77, 87d. These references cover large swaths of TRMC's allegations, particularly
27 those where TRMC chooses to summarily list its baseless and defamatory accusations. Moreover, it is often difficult
28 to tell where TRMC's reliance on "information and belief" begins and ends. For instance, in its cause of action for
fraud, TRMC expressly relies on information and belief for portions of its allegations. *See* Dkt. No. 9 at ¶¶ 12-13.
However, it is clear from other sections of the Counterclaim that in fact all of the allegations upon which its fraud
cause of action rest are based on information and belief. *Compare* Dkt. No. 9 at ¶¶ 2, 18 with ¶¶ 34-40.

1 alleges that HCCA “represented to the District that loans and/or sales proceeds from the sale of
2 District were needed to cover operational expenses for the hospital and related healthcare
3 facilities,” and “that any monies obtained from the loans/sales proceeds would be used to satisfy
4 increasing accounts payable and other creditors of the District . . . [and] would be used to pay
5 ongoing operational expenses of the District.” Dkt. No. 9 at ¶ 34. TRMC then asserts that these
6 representations were false because loan monies and sales proceeds were allegedly used for
7 “HCCA’s personal use and benefit . . . [r]ather than providing the sales proceeds to the District,”
8 and “were never made available to the District to cover operational or other expenses.” *Id.* at
9 ¶ 35.

10 But these allegations are contradicted by the express terms of the Management Services
11 Agreement (“MSA”) between the parties, which is an exhibit to the Counterclaim. It permits
12 HCCA to pay itself monies TRMC owed it from such proceeds. Section 4(g)(v) of the MSA
13 provides: “Manager [HCCA] is hereby authorized to make payment from the Master Account or
14 other accounts of the District, including the Depository Account, to itself and its Affiliates of any
15 amounts due to it or any of them by the District under this Agreement or otherwise [...]” Dkt.
16 No. 11, Ex. 3 (MSA), pp. 1 (preamble), 4 at § 1(kk), and 15 at § 4(g)(v). *See Tellabs, Inc. v.*
17 *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322-23 (2007) (courts ruling on Rule 12(b)(6)
18 motions to dismiss must consider the complaint and “documents incorporated into the complaint
19 by reference”); *see also Amfac Mortg. Corp. v. Arizona Mall of Tempe, Inc.*, 583 F.2d 426, 429-
20 30 (9th Cir. 1978) (documents attached to plaintiff’s complaint “are properly a part of the court’s
21 review as to whether plaintiff can prove any set of facts in support of its claim”). Thus, even if
22 HCCA made the representations and took the actions that TRMC alleges, which HCCA does not
23 concede, those representations would not have been false.⁷ If HCCA represented that it would
24 use monies to satisfy TRMC’s accounts payable, other creditors, or operating expenses, that is
25 exactly what HCCA is alleged to have done and was entitled to do under the MSA. Therefore, no
26 misrepresentation was made. TRMC thus cannot establish the falsity of the alleged

27 _____
28 ⁷ TRMC has not provided sufficient time, place, and individual details for HCCA to determine what representations,
if any, TRMC references.

1 representations, that HCCA “knew” the alleged statement was false (because it was not), or that
2 TRMC was harmed by HCCA abiding by the MSA.⁸

3 TRMC’s cause of action for fraud should therefore be dismissed for failure to plead with
4 the required particularity under Rule 9(b) and for failure to state a claim under Rule 12(b)(6).

5 **2. The Fourth Cause Of Action (For Negligent Misrepresentation)**
6 **Should Be Dismissed For Failure To Allege An Actual**
7 **Misrepresentation And Because It Is Not Pleaded With The Required**
8 **Particularity.**

9 The Counterclaim’s fourth cause of action (for negligent misrepresentation) expressly
10 relies on the same allegations as its cause of action for fraud. *See* Dkt. No. 9 at ¶¶ 41-47; *Vess*,
11 317 F.3d at 1108. As described in section II.C.1 above, these allegations do not allege an actual
12 misrepresentation, because even if true, HCCA was a creditor of TRMC entitled under the MSA
13 between the parties to use the type of monies and sale proceeds referenced to pay amounts owing
14 to HCCA by TRMC. Thus, TRMC cannot show that the alleged misrepresentations were false,
15 that HCCA had “no reasonable grounds” to believe the statements to be true, or that TRMC was
16 harmed by HCAA’s alleged use of the monies pursuant to the MSA.⁹

17 Furthermore, TRMC’s negligent misrepresentation claim suffers from the same lack of
18 particularity in its pleading as its cause of action for fraud, as the same alleged, unspecified
19 representations form the basis for both. *See Moore*, 885 F.2d at 540-41; *see also Shroyer*, 622
20 F.3d at 1042. They do not assert what specific representations were made, who made the
21 representations, or when and where the representations were made.

22 The Counterclaim’s fourth cause of action (for negligent misrepresentation) should
23 therefore be dismissed for failure to plead with the required particularity under Rule 9(b) and for
24 failure to state a claim under Rule 12(b)(6).

25 ⁸ *See* California Civil Jury Instruction (“CACI”) No. 1900 (“Intentional Misrepresentation”; listing as elements that a
26 party represented that a fact was true; that the representation was false; that the speaker knew the representation was
27 false when it was made; that the speaker intended the recipient to rely on the representation; that there was reasonable
28 reliance; that the complaining party was harmed; and that the reliance was a substantial factor in the harm).

⁹ *See* CACI No. 1903 (“Negligent Misrepresentation”; listing as elements that a fact was alleged to be true; that the
representation was not true; that the speaker had no reasonable grounds to believe it was true; that the speaker
intended the listener to rely on the representation; that there was reasonable reliance; that the complaining party was
harm; and that the reliance was a substantial factor in the harm).

1 **3. The Fifth Cause of Action (For Concealment) Should Be Dismissed**
2 **Because It Is Not Pleaded With The Required Particularity.**

3 Concealment is a species of fraud under California law¹⁰ and is subject to the heightened
4 pleading requirements of Federal Rule of Civil Procedure 9(b). *See Vess*, 317 F.3d at 1108
5 (where complaint “alleges a unified course of fraudulent conduct ... Rule 9(b) applies to the
6 whole of that complaint”). This claim offers no specific factual basis for its allegations of
7 concealment; only conclusions and argument. *See Moore*, 885 F.2d at 540-41; *see also Shroyer*,
8 622 F.3d at 1042. For instance, the Counterclaim alleges that HCCA wrongfully refused to
9 provide financial records upon demand, provided misleading financial reports, and provided and
10 maintained intentionally false financial records. Dkt. No. 9 at ¶ 50. But these allegations do not
11 identify any *specific* action taken by HCCA showing concealment. They do not include the time
12 or place or content of any alleged demand or the identity of an individual making such demand or
13 engaged in such concealment; nor do they identify any specific financial information or records
14 that were supposedly false or misleading. Similarly, TRMC broadly alleges that HCCA
15 fraudulently mismanaged TRMC’s financial information, “artificially inflat[ed] the District’s
16 books,” and “disguised the improper transfers of money,” but offers no specific facts in support of
17 any of these contentions. Dkt. No. 9 at ¶ 50.

18 Moreover, all of TRMC’s allegations relating to its cause of action for concealment are
19 again made on “information and belief.” As discussed above, “information and belief” pleading
20 imposes an *additional* requirement that the Counterclaim include “a statement of facts on which
21 the belief is founded.” *Shroyer*, 622 F.3d at 1042. The Counterclaim, however, offers no factual
22 basis for any of its “information and belief” assertions, and therefore should be dismissed.

23 **4. The Sixth Cause Of Action (For Conversion) Should Be Dismissed**
24 **Because It Is Not Pleaded With The Required Particularity.**

25 TRMC’s sixth cause of action (for conversion), like those discussed above, fails to
26 provide a factual basis for its assertions and instead improperly relies on “information and belief”
27

28 ¹⁰ *See* CACI No. 1901 (“Concealment”; listed under the subheading “Series 1900 Fraud or Deceit”).

1 pleading. In addition, it is based on alleged fraudulent conduct (including some of the same
2 conduct that forms the basis for TRMC's claims of fraud, negligent misrepresentation, and
3 concealment). *See Vess*, 317 F.3d at 1108. The Counterclaim does not provide any factual basis
4 for its conversion claims, and again relies exclusively on a list of unsupported, summary
5 conclusions and arguments based on information and belief. Dkt. No. 9 at ¶ 58. As discussed
6 above, such summary allegations listed without a factual basis do not satisfy the particularity
7 requirement of Rule 9(b), and should be dismissed.

8 **5. The Seventh Cause Of Action (For Breach Of Fiduciary Duty) Should**
9 **Be Dismissed Because It Is Not Pleaded With The Required**
10 **Particularity And Because It Relies On Deficient Fraud Pleadings.**

11 The Counterclaim's seventh cause of action (for breach of fiduciary duty) reiterates and
12 incorporates TRMC's claims of fraud and conversion (*see* Dkt. No. 9 at ¶ 64, numbers 1, 2, 3, 4,
13 and 6), and adds an additional claim (¶ 64, number 5) that HCCA "intentionally interfer[ed] with
14 the seating of a Board Member". The claims based on fraud and conversion fail for the reasons
15 discussed in sections II.C.1 and II.C.4, *supra* – they are not pleaded with sufficient particularity,
16 are improperly based on information and belief, and, with respect to the fraud claims, fail to assert
17 an actual misrepresentation. Meanwhile, the additional claim related to the seating of a board
18 member suffers from the same lack of particularity as the other claims. That claim, too, is only
19 pleaded on information and belief. *See* Dkt. No. 9 at ¶ 2, 15. Respectfully, the seventh cause of
20 action (for breach of fiduciary duty) should therefore be dismissed for failure to state a claim
21 under Rule 12(b)(6) and for failure to plead with the required particularity under Rule 9(b).

22 **6. The Eighth Cause of Action (For Violation Of The California False**
23 **Claims Act) Should Be Dismissed Because It Merely Recites Statutory**
24 **Language And Is Not Pleaded With The Required Particularity.**

25 The Counterclaim's eighth cause of action (for violation of the California False Claims
26 Act) includes no new allegations and does nothing more than recite the False Claims Act statute
27 "on information and belief." *Compare* Dkt. No. 9 at ¶ 70 with Cal. Gov't Code § 12651(a)(1),
28 (2), (4), (7). This is plainly insufficient to state a claim. *Ashcroft v. Iqbal*, 556 U.S. 662, 678
(2009) ("A pleading that offers . . . 'a formulaic recitation of the elements of a cause of action

1 will not do' . . . Threadbare recitals of a cause of action's elements, supported by mere conclusory
2 statements, do not suffice.”). Further, to the extent this cause of action relies on reference to
3 TRMC’s earlier allegations of fraud and conversion, and on pleading on information and belief, it
4 fails for the reasons discussed above.¹¹ The eighth cause of action (for breach of fiduciary duty)
5 should therefore be dismissed for failure to state a claim under Rule 12(b)(6) and for failure to
6 plead with the required particularity under Rule 9(b).

7 **7. The Eleventh Cause Of Action (For Equitable Subordination) Should**
8 **Be Dismissed To The Extent It Relies On Other Invalid Claims And**
9 **Causes Of Action.**

10 TRMC’s eleventh cause of action (for equitable subordination) restates and incorporates
11 its various allegations of fraud and conversion. Dkt. No. 9 at ¶ 87. To the extent TRMC’s claim
12 of equitable subordination relies on other insufficiently pleaded causes of action, it too should be
13 dismissed for failure to state a claim under Rule 12(b)(6) and for failure to plead with the required
14 particularity under Rule 9(b).

15 **D. Portions Of The Counterclaim Pleaded On Information And Belief Without**
16 **Factual Support Should Be Stricken Pursuant To Fed. R. Civ. P. 12(f) As**
17 **Immaterial, Impertinent, And Scandalous.**

18 To the extent any portion of the Counterclaim is not dismissed for the reasons discussed
19 above, HCCA also moves that the Court strike the following portions of the Counterclaim as
20 improperly pleaded on “information and belief”:

21 **From the Background Sections:**

- 22 • Page 2, line 28 through page 3, line 21 (paragraph 2);
- 23 • Page 6, approximately lines 19 through 21 (paragraph 11);
- 24 • Page 6, approximately line 23 through Page 7, line 2 (paragraph 12);
- 25 • Page 8, lines 4 through 8 (last sentence of paragraph 15);
- 26 • Page 8, line 27 through page 9, line 1 (last sentence of paragraph 17);
- 27 • Page 9, lines 8 through 11 (last sentence of paragraph 18);

28 ¹¹ Throughout the Counterclaim, TRMC repeatedly refers back to and “incorporates” the entirety of its run-on
accusations rather than properly stating a cause of action with a factual basis. Such references rely on paragraph
upon paragraph of irrelevant (and inaccurate) allegations and provide no meaningful guidance to the Court or other
parties as to the basis of a given cause of action.

- Page 9, lines 18-20 (last non-citation sentence of paragraph 19); and
- Page 10, lines 2 through 6 (last two sentences of paragraph 21).

From the Causes of Action:

- Page 12, line 25 through page 13, line 5 (portion of paragraph 35);
- Page 14, line 23 through page 15, line 6 (paragraph 50);
- Page 15, line 24 through page 16, line 4 (paragraph 58);
- Page 17, lines 16 through 24 (paragraph 70);
- Page 18, lines 14 through 18 (last two sentences of paragraph 77); and
- Page 20, lines 19 through 21 (paragraph 87d).

In each of these sections, TRMC uses “information and belief” pleading to level accusations of misconduct against HCCA without any supporting facts. As discussed above, allegations of fraud based on information and belief “must state the factual basis for the belief.” *Neubronner*, 6 F.3d at 672; *see also Shroyer*, 622 F.3d at 1042. TRMC fails to offer any such factual basis for its “information and belief” pleadings, and such allegations should therefore be stricken.¹²

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¹² Due to TRMC’s uncareful drafting, it is not always clear where TRMC’s allegations on “information and belief” begin and end. To the extent the Court identifies any other claims and allegations in the Counterclaim to be improperly based on information and belief, those too should be stricken.

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III. CONCLUSION

Based on the foregoing, HCCA respectfully requests the Court issue an order dismissing the Counterclaim or, in the alternative, dismissing and striking the portions of the Counterclaim identified herein.

Dated: January 29, 2018

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